U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: JAN 0 2 2013 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician specializing in neonatal and perinatal medicine. At the time he filed the petition, the petitioner was a resident physician training at United States Citizenship and Immigration Service (USCIS) records indicate that he currently works in The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on October 6, 2011. An accompanying letter from [redacted] indicated that the petitioner "began his residency training at [redacted] and is expected to graduate from the residency program on June 30, 2012." Thus, at the time of filing the petition, the petitioner was already a licensed physician, but was still undergoing medical training.

The petitioner submitted a copy of an article that he co-authored for One initial exhibit included the following statement, submitted without attribution but apparently written by counsel:

> We have attached a recent publication [by the petitioner] in the Documentation regarding this publication is also attached. As can be seen from the documentation regarding this journal, it is ranked 16 out of approximately 8000 science journals that were ranked by Thomson Reuter/ISI in 2010. To be able to publish a scientific article in this journal, one needs to be preeminently qualified as an extraordinary researcher in the field (as can be evidenced form [*sic*] the selection criteria of the journal). [The petitioner] is the first author and lead researcher of the publication, which qualifies to be the equivalent of a National Award in the field of neonatal-perinatal medicine.

The only evidence presented to support the above claims is a printout from the web site of the , which does not say what counsel claimed it says. The printout indicates that Thomson Reuters/ISI produces "rankings of approximately 8,000 science journals," but it does not rank "16 out of approximately 8000 science journals." Rather, the printout ranks the journal 16th "among Journals." The printout does not identify the total number of Journals," but an accompanying printout from another site, ranks 15th out of 133 in the "Subject Category" of "

Counsel and the petitioner presented no evidence to support the claim that publication of an article in "qualifies to be the equivalent of a National Award in the field of neonatal-perinatal medicine." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The SJR printout indicates that published 343 "doc[ument]s" in 2010. The 14 higher-ranked journals collectively published 2,837 more that same year. Such a fact does not indicate that the publication of the petitioner's article is tantamount to "a National Award." Similar objections apply to the claim that the petitioner's conference presentations and article in "are deemed to be classified as a preeminent award."

Although counsel repeatedly claimed that the petitioner had submitted "selection criteria" for publication and presentation, the background information about and the conferences contains nothing to indicate "selection criteria" on the level of a "National Award" or "preeminent award." The "Instructions for Authors" from the web site calls for "definitive papers that present the entire contents of a research project," and indicates that "[a]cceptance of manuscripts is based on scientific content and presentation of the material." Nothing in the submitted evidence supports counsel's claim that "one needs to be preeminently qualified as an extraordinary researcher in the field" to publish one's work in

A "Call for Abstracts" for "Renal Week 2008," a conference of the American Society of Nephrology (ASN), specifies the nature of subject matter to fall under various categories and describes the peer

review process, but there is once again no indication that acceptance of an abstract is comparable to an award. With respect to counsel's claim that "one has to be preeminently qualified in his/her area of research" in order to make a presentation at the conference, the record shows that "[a]ll abstracts submitted to the American Society of Nephrology are blindly peer reviewed so authors' names and institutions are not disclosed to reviewers." Thus, the peer reviewers cannot take the authors' qualifications into account; the information is deliberately withheld from them. Furthermore, the ASN's open "Call for Abstracts" appears to be, on its face, inconsistent with the notion that conference presentation is a privilege granted to a rarefied few. The only stated requirement for submission of an abstract is that "[a]bstracts must be submitted or sponsored by an active ASN member."

The petitioner submitted documentation of the impact factors of the journals that carried his two articles mentioned above. A journal's impact factor derives from the citation rates of articles published in that journal. Nevertheless, the petitioner did not submit evidence of citation of his articles. A journal's impact factor is a calculated average, rather than evidence that a given article within that journal will ultimately earn a comparable number of citations.

The petitioner's initial submission referred to five witness letters, one of them from an official of where the petitioner worked as a staff physician from and the other four from faculty members working at The AAO can locate only two of these letters in the record. (The AAO notes that counsel quotes from several witness letters on appeal, but not from the letters that are missing from the record.)

stated:

> Without question, [the petitioner] has distinguished himself as a physician of superior ability in neonatology. His provision of persistent, detailed care has saved the lives of countless patients.
>
> I am most familiar with [the petitioner's] outstanding scholarly contributions to the field of neonatology. As with all exceptional physicians, an important component of their job is to make advances in patient care and develop new procedures and treatment options to better support the needs of this growing patient population. [The petitioner] is dedicated to this aspect of his practice, and already has made significant contributions to the understanding of renal complications in neonates.

did not provide any information about the petitioner's contributions, except to note that the petitioner has published his research in journals and presented it at conferences.

medical director of the and associate professor at , stated that the petitioner "has demonstrated exceptional success and excellence, both academically and professionally, and distinguished himself as a physician of superior ability in neonatology." asserted that improvements that the petitioner put in place have "saved the lives of numerous patients." As an example,

discussed the case of a premature infant who, due to the petitioner's treatment, "was able to avoid serious complications and even possible death."

The petitioner's skill and competence as a neonatologist is not in question in this proceeding. The record amply demonstrates that neonatologists must often treat fragile patients whose very survival depends on the quality of care received. This, however, is an essential trait of neonatology in general, rather than an aspect that elevates the petitioner over other neonatologists.

On March 2, 2012, the director issued a request for evidence, instructing the petitioner to submit documentary evidence to meet the guidelines set forth in *NYSDOT*. The director requested evidence to show that other researchers have cited the petitioner's published work.

The petitioner's response included no documentary evidence to establish the impact of his work. Instead, the petitioner submitted copies of two of his research writings (one article and one abstract), and background information about infant mortality, a predicted shortage of physicians, and the salary range of neonatologists. Counsel explained that the petitioner submitted the salary information to show that he "commands a salary or other remuneration for services that demonstrates his exceptional ability. . . . [A] neonatologist earns approximately 25% more than general pediatricians."

Evidence of high remuneration can form part of a successful claim of exceptional ability under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D). Aliens of exceptional ability, however, are still subject to the job offer/labor certification requirement at section 203(b)(2)(A) of the Act. Furthermore, the submitted evidence is about neonatologists in general; it does not mention the petitioner at all, much less distinguish him from other neonatologists. The regulatory definition of "exceptional ability" at 8 C.F.R. § 204.5(k)(2) is "a degree of expertise significantly above that ordinarily encountered." Clearly, a given alien must stand out in comparison to others in the same field. USCIS will not conclude that all neonatologists, as a class, are collectively "exceptional" in comparison to all pediatricians as a class. There is no blanket waiver for neonatologists, and USCIS has no authority to create one.

By enacting section 203(b)(2)(B) of the Act, Congress created a blanket waiver for certain physicians practicing in medically underserved areas, but the petitioner has made no specific claim of eligibility for such a waiver. The petitioner submitted a copy of an article from the *Wall Street Journal* reporting that "the nation could face a shortage of as many as 150,000 doctors in the next 15 years," but to qualify for a national interest waiver as a physician in a shortage area, the petitioner must meet various conditions set forth in the USCIS regulations at 8 C.F.R. § 204.12. The petitioner and counsel did not make any argument pertaining to those regulations or provide documentation that satisfies the conditions therein.

The remainder of the response consisted of counsel's cover letter and recommendation letters from several witnesses. Counsel referred to most of these letters as "recommendation letters," except for the letter from [redacted] counsel referred to that letter as "a 'Peer Review.'" Counsel did not explain the intended distinction between a "recommendation letter" and "a 'Peer

Review.'" Peer review is an evaluation process used by journal publishers and conference organizers. letter is not a statement from a peer reviewer, reporting the results of peer review (such as a recommendation for or against publication, or a list of flaws that require correction). Rather, it is a letter addressed to USCIS, praising the petitioner's work and advocating approval of the waiver. As such, it is indistinguishable from a "recommendation letter."

stated that the petitioner's article dealt with important questions about kidney filtration function, and possible causes for failure of those functions. asserted that the petitioner's work "is on the cutting edge of kidney developmental research" and that its "scientific and clinical implications are invaluable." With respect to the director's request for evidence of citation, contended that "[t]he very specific nature of this project . . . might be a limiting factor for a number of existing references to this publication at the moment." It may be true that a highly specialized topic might be one explanation for a low citation rate, but lack of interest is another. The petitioner submits no evidence (such as a printout from a citation database) to show the typical citation rate for articles on the specialized subject in question.

offered another explanation for the low citation rate, stating that the petitioner's articles are "very recent" and "are only now percolating to research institutions worldwide. We will start to see citations to these two extremely important papers towards Fall 2012." USCIS will not approve an immigration benefit on the expectation that qualifying evidence will appear at some point in the future. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

asserted that "research to extrapolate and further extend the discoveries made by [the petitioner's] publications is already being conducted at and many other research institutes around the world." As a faculty member, is in a position to say what research is underway at that institution, but he neither submitted nor cited any evidence to support his claims about other institutions, nor did he identify any source for the information presented. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Similar objections apply to the letter from assistant professor at Like contended that the petitioner's work is widely influential but this influence has not yet had time to show itself through independent citations in published articles. praised two of the petitioner's published articles (apparently the only two articles he had published up to that time) and stated that the petitioner's work lent

> an innovative approach to further investigations that have already started at our institution, and in the leading research labs at University of Pennsylvania, University of Alabama, University of Miami, Harvard University in the United States, as well as abroad at Hannover Medical School, University Aachen and University of Heidelburg. . . .
>
> The cutting edge nature of these publications brought on a new surge of scientific interest in kidney development and disease, and I foresee a number of high scientific-yield publications in the new future as it takes at least a few months for well-designed and meticulously conducted basic research studies to be completed and published in leading medical and scientific journals.

The director denied the petition on June 20, 2012. The director acknowledged the intrinsic merit of the petitioner's occupation, and that the benefit from medical research is national in scope. The director found, however, that the petitioner had submitted minimal evidence of his research activity, and no objective evidence of its influence or impact. The director asserted that eligibility cannot rest on speculation about the possible future impact of the petitioner's recently published work.

On appeal, counsel states: "The Record provides convincing evidence that Respondent has had and continues to have a substantial impact on the overall field." Referring to the witness letters in the record, counsel states that "renowned experts concur that [the petitioner's] expertise and leadership in the field of neonatal-perinatal medicine have set him apart from others. The testimonials of his peers make it clear that as both a clinician and medical researcher he possesses superiority."

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The submitted letters are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In this instance, the petitioner has submitted letters offering general praise for the petitioner, and attesting to the petitioner's impact on his field, but providing little information as to the nature of that impact. Regarding the lack of evidence of citation of his published work, witnesses have claimed that it is simply too early to expect many citations. Nevertheless, the assertion that citations will eventually appear seems to be little more than speculation.

Counsel contests the director's "flawed reasoning" that the petition "would be more amenable to the labor certification process," because the petitioner had submitted "convincing evidence that respondent has had and continues to have a substantial impact on the overall field." Among this "convincing evidence," counsel counts one of the petitioner's published articles, which counsel characterizes as "the equivalent of a National Award" but provides no documentary evidence to support the claim.

Counsel quotes claim that the petitioner's published work "brought on a new surge of scientific interest in kidney development and disease," but the petitioner has not documented this "surge." Instead, the petitioner has submitted letters from witnesses who do not represent a random sampling of experts in the field, and whose opinions do not represent an evident consensus within the field.

The waiver application rests on the claim that the petitioner has conducted especially influential research in neonatal and perinatal nephrology. The petitioner has not submitted documentary evidence of this influence but rather witness letters from colleagues who claim that other researchers may cite the petitioner's work in their own publications. As noted previously, the petitioner must be eligible for the waiver as of the petition's filing date. It cannot suffice for the petitioner, counsel, or any witness on the petitioner's behalf to claim that the petitioner's influence will become evident at some unspecified future date.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.